IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

WILLIAM ORTA JR.,
Petitioner.

No. 2 CA-CR 2014-0100-PR
Filed June 17, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Yuma County
No. S1400CR200400864
The Honorable John Paul Plante, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART

COUNSEL

Jon R. Smith, Yuma County Attorney
By Charles Platt, Deputy County Attorney, Yuma
Counsel for Respondent

Sharmila Roy, Laveen
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner William Orta Jr. seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Such an abuse encompasses a mistake of law. *See State v. Fields*, 196 Ariz. 580, ¶ 4, 2 P.3d 670, 672 (App. 1999). Because we conclude the court misapplied the law of newly discovered evidence as it relates to recanted testimony, we grant relief in part.

¶2 After a jury trial, Orta was convicted of child molestation and engaging in sexual conduct with a minor under the age of twelve. The trial court sentenced him to a mitigated, ten-year term of imprisonment on the molestation count and a life term without the possibility of parole for thirty-five years on the sexual-conduct count, to be served consecutively. The convictions and sentences were affirmed on appeal. *State v. Orta*, No. 1 CA-CR 08-0191 (memorandum decision filed Jan. 26, 2010).

¶3 Orta thereafter sought post-conviction relief, arguing in his petition that he had received ineffective assistance of counsel based on counsel's failure to (1) "investigat[e] further about what [the court] really meant" when it rejected the first plea agreement reached with the state, (2) adequately explain to Orta the second plea offer the state had made, (3) properly advise Orta as to his chances of prevailing at trial, (4) cross-examine the victim as to "inconsistencies between her trial testimony and the interview she gave to the police," (5) challenge the sufficiency of the evidence on the child-molestation count, and (6) request a lesser-included-

offense instruction on the sexual-conduct count. He also argued newly discovered evidence entitled him to relief.

¶4 The trial court determined Orta's claim of newly discovered evidence was colorable and scheduled an evidentiary hearing. The claim was based on an affidavit by S.C., the victim's friend, in which S.C. averred the victim had recanted to her. After the hearing, despite finding S.C.'s testimony "persuasive" and concluding her new testimony "probably would have" changed the outcome of the trial, the court determined that the evidence was not newly discovered and, on that basis, denied relief.

¶5 On review, Orta maintains the trial court abused its discretion in concluding S.C.'s affidavit did not constitute new evidence and in summarily dismissing his claims of ineffective assistance of counsel in relation to the sufficiency of evidence on the molestation count and his attorneys' failures to adequately advise him of his chances of prevailing at trial or to request a lesser-included-offense instruction. We first address Orta's claim of newly discovered evidence, on which the court held an evidentiary hearing.

¶6 Our review of the trial court's factual findings related to the hearing "is limited to a determination of whether those findings are clearly erroneous." *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). When "the trial court's ruling is based on substantial evidence, this court will affirm." *Id.* Orta had the burden of proving his factual allegations by a preponderance of the evidence. *See* Ariz. R. Crim. P. 32.8(c). And, the trial court was "the sole arbit[er] of the credibility of witnesses" at the evidentiary hearing. *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988); *see also Sasak*, 178 Ariz. at 186, 871 P.2d at 733 ("It is the duty of the trial court to resolve any conflicts in the evidence.").

¶7 The trial court ruled that S.C.'s affidavit did not constitute newly discovered evidence within the meaning of Rule 32.1(e). "There are five requirements to establish a colorable claim of fresh evidence, one of which is that 'the evidence must appear on its face to have existed at the time of trial but be

discovered after trial.'" *State v. Andersen*, 177 Ariz. 381, 387, 868 P.2d 964, 970 (App. 1993), *quoting State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989). The court here concluded the new evidence about S.C. and the victim's conversation did not meet that requirement. The court noted that the victim had testified at trial that S.C. had asked her "if it happened" and she "told her no because [she] was embarrassed." And the court noted that, although not directly asked about a recantation, S.C. testified at trial that the victim had told her she hated Orta and "wanted him out of the house."

¶8 In the affidavit provided in support of Orta's claim, S.C. not only repeated that the victim hated Orta, but she admitted that she had lied to the investigating detective and her mother about her conversation with the victim. S.C. averred she had told the interviewing detective that the victim had not told her directly that she had lied about the molestation, but that another friend had told her the victim had said that. S.C. further averred that the victim had in fact told her directly that she had lied about the molestation because she hated Orta and wanted him out of the house.

¶9 S.C.'s testimony at the evidentiary hearing was consistent with her affidavit. She explained that she had been in a room with the victim and her mother, and after her mother left the room the victim had told S.C. that "she lied" about Orta "touching her so he would be out of the house because she didn't like him." At the hearing, defense counsel also explained that she had made a strategic decision at trial not to press S.C. on the issue because she believed that S.C. would not "testify that [the victim] had lied," based on S.C.'s having been "firm" in her position—telling both the detective and her mother that the victim had not recanted to her personally. Indeed, although third parties, A.T. and M.T., had told the investigating detective in an interview that S.C. had told M.T. that the victim had admitted to her directly that Orta had not molested her, S.C. later denied any such statement to them. A.T. and M.T.'s statements were ruled inadmissible. The court found that S.C.'s account of events set forth in her affidavit and at the hearing was a recantation of her original story. The court

concluded, however, that the recantation did not constitute newly discovered evidence as a matter of law.

¶10 Although recantation does not always squarely fit the definition of newly discovered evidence, our supreme court has recognized that it may be "[n]ewly discovered material facts," entitling a petitioner to relief under Rule 32.1(e), if the recantation is credible and probably would have changed the verdict. *See State v. Hickle*, 133 Ariz. 234, 238, 650 P.2d 1216, 1220 (1982); *see also Pacheco v. Artuz*, 193 F. Supp. 2d 756, 761 (S.D.N.Y. 2002) ("In many cases, no amount of due diligence on the part of a petitioner can compel a witness to come forward and admit to prevaricated testimony . . . ."); *Cammarano v. State*, 602 So. 2d 1369, 1371 (Fla. Dist. Ct. App. 1992) ("Without [the witness's] cooperation, any prior interviews with him would not have brought forth his recantation, however diligently his interviewer questioned him."). In this case, although there was some evidence at the time of trial that S.C. had lied to the investigating detective, she continued in that lie until she was interviewed by an investigator in relation to the Rule 32 proceedings. Thus, S.C.'s change in her account of events may properly be considered newly discovered evidence if the trial court determines it would likely change the verdict and is credible. The assessment of the "credibility of the recanted evidence is a controlling factor which can best be made in the court that heard the original testimony." *State v. Sims*, 99 Ariz. 302, 310, 409 P.2d 17, 22 (1965).

¶11 In this case, the trial court made clear that it found S.C.'s testimony credible and believed it would have changed the outcome of the trial. In view of that credibility determination, and in view of the above legal standards relating to recanted testimony, we cannot agree with the court's legal conclusion that Orta was not entitled to relief. The court noted that were it not for its conclusion that the evidence did not qualify as newly discovered, "the interests of justice would be served by a new trial" and it "would allow the

state to present its evidence at the post conviction relief hearing and then decide the matter of whether a new trial should be granted."[1]

¶12 We conclude the trial court misapplied the law relating to recantation and newly discovered evidence and, consequently, grant Orta relief, in part, and remand the matter to the trial court so that it may "allow the state to present its evidence" and determine if a new trial is appropriate. Because the trial court may determine that a new trial is appropriate, thereby mooting Orta's claims of ineffective assistance of counsel, we do not address those claims. If the trial court denies Orta relief after the continued evidentiary hearing, those issues may be heard in a petition for review from that denial.

¶13 For these reasons, we grant the petition for review and grant relief in part.

[1]The transcript of the evidentiary hearing shows that, after Orta presented his witnesses, the state moved to "terminate[]" the hearing, arguing Orta had the burden of proof and had failed to meet it.